BORNEO CO. (M) SDN. BHD. v. PENANG PORT COMMISSION

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Wan Suleiman F.J.) June 6, 1975]

[Alor Star — Federal Court Civil Appeal No. 170 of 1974]

Port Authority — Bailment — Breach of duty by bailees — Liability in damages.

Practice and Procedure — Appeal — Points raised for first time — No new facts adduced.

Evidence — Whether invoices admissible in proof of contents of goods shipped — Agreed bundle — Bills of lading — Evidence Act, 1950, s. 32.

The appellants were consignees of two cases of pharmaceutical goods from London carried by ship. The pharmaceuticals appeared in the ship's manifest and were unloaded, tallied, removed and kept in the godown of the respondents. When the respondents failed to deliver the goods on demand the appellants sued them for the value of the goods. The learned trial judge dismissed the claim holding that the invoices were in admissible in proof of the contents of the two cases and therefore that the two cases delivered into the bailment of the respondent had not been proved to contain the pharmaceuticals. The appellants appealed.

Held, allowing the appeal: (1) the bills of lading which were admitted in this case were *prima facie* evidence of the goods shipped and raised a presumption that the goods discharged contained the pharmaceuticals, which presumption had not been discharged by the respondent;

(2) as the learned judge had found that the respondents could not be said in this case to have exercised due care, they were liable to make good the value of the goods.

Cases referred to:-

(1) *Sim Tiew Bee* v. *Public Prosecutor* [1973] 2 M.L.J. 200.

(2) *Muller & Phipps (M) Sdn. Bhd.* v. *Penang Port Commission* [1974] 2 M.L.J. 39.

(3) *Yong Mok Hin* v. *United Malay States Sugar Industries Ltd.* [1967] 2 M.L.J. 9.

(4) *Attorney-General* v. *Pang Ah Yew* [1934] M.L.J. 184, 187.

(5) *Banbury* v. *Bank of Montreal* [1918] A.C. 626, 659, 705, 714.

(6) *"Tasmania" Case* (1890) 15 App. Cas. 233.

(7) *Henry Trading Company Ltd.* v. *Harun* [1966] 2 M.L.J. 281, 282.

(8) *Hain Steamship Company Ltd.* v. *Herdman & McDougal* (1922) 11 Ll. L.R. 58.

(9) *Borneo Co. (M) Sdn. Bhd.* v. *Port Swettenham Authority* Kuala Lumpur — Civil Suit No. 104 of 1971 (unreported).

(10) *T.W. Wu & Co. (M) Sdn. Bhd.* v. *Sanko Asia Ltd. & Anor.* [1975] 1 M.L.J. 15.

FEDERAL COURT.

P. Cumarasamy for the appellants.

Lim Peng Siew for the respondent.

Lee Hun Hoe C.J. (Borneo): Appellants/plaintiffs were consignees of two cases of pharmaceutical goods from London carried by s.s. "Cardiganshire" which arrived in Penang. The pharmaceuticals appeared in the ship's manifest and were unloaded, tallied, removed and kept in the godown of respondent/defendant. When respondent failed to deliver the goods on demand appellants sued respondent for the value of the goods. The learned judge held that the two cases delivered into the bailment of the respondent had not been proved to contain the pharmaceuticals alleged. So, he dismissed the claim with costs. Appellants appealed.

At the trial the following facts were agreed by the parties: —

(i) Appellants were consignees of the two cases of pharmaceuticals;

(ii) S.S. "Cardiganshire" arrived in Penang Port on November 19, 1971;

(iii) Value of the two cases if proved to contain the alleged pharmaceuticals is $5,155.65;

(iv) If the court found that the two cases were delivered into the custody of the respondent, then the respondent admit that they were bailees for reward of the two cases.

Three issues were submitted for the decision of of the learned judge, namely: —

(1) Whether the two cases did contain the pharmaceuticals as alleged.

(2) If so, whether the two cases were discharged into the custody of the respondent.

(3) If delivered, whether the respondent had exercised their duty of care.

The learned judge found on the second issue that the two cases were discharged into the custody of the respondent. On the third issue he stated that the defendant could not be said to have exercised due care. However, on the first issue he found himself, it would seem rather reluctantly, to be bound by *Sim Tiew Bee* v. *Public Prosecutor*(1) to rule that the invoices were inadmissible in proof of the contents of the two cases. He said that would be so even if he was to hold that *Muller & Phipps (M) Sdn. Bhd.* v. *Penang Port Commission*(2) was distinguishable. In *Muller's* case the invoices never appeared in the Agreed Bundle and the defendant were in fact taken by surprise on the production of the documents at the trial.

So, the question before this court is really against the finding of the first issue. Before the hearing of this appeal, leave was granted to appellants to include two additional grounds of appeal and to include a document which is the reverse side of a bill of lading (See page 74 of Appeal Record). The reverse side in fact appears in the original bill of lading. The two additional grounds allege that (1) the learned judge failed to consider the effect of the contents of the bill of lading at page 33 of the Agreed Bundle No. 1 (page 74 of Appeal Record) and (2) having regard to the contents of the said bill of lading and the evidence of PW2 and PW3 there was sufficient proof to indicate the contents of the two cases.

It was said that these two points were not raised at the trial. In *Yong Mok Hin* v. *United Malay States Sugar Industries Ltd.*(3) it was held that the Federal Court was not precluded from considering points raised for the first time. In that case objection was taken by respondent against appellant arguing a point of law not taken in the court below. MacIntyre J. as he then was, delivered, if I may also say so, with respect, a lucid judgment with which Barakbah L.P. and Azmi C.J. concurred. *Attorney-General* v. *Pang Ah Yew*,(4) *Banbury* v. *Bank of Montreal*(5) and *"Tasmania" Case*(6) were cited. He pointed out that all the

facts necessary for determination of the point of law raised were before the trial court. The facts could also be found in the pleading. The issue was in fact raised by appellants.

In the present case there are 8 bills of lading in the Agreed Bundle No. 1. There was controversy as to the inclusion of various documents in the Agreed Bundles as their admissibility or contents seemed to be disputed. It is true that these two Agreed Bundles were prepared by appellants but they were examined by respondent before they were put in. Respondent cannot be said to be taken by surprise. The position was clearly recorded by the learned judge at page 15 of the Appeal Record. All the documents in Agreed Bundle No. 2 are tally sheets and the contents were not admitted. The contents of all documents in Agreed Bundle No. 1 recorded as not admitted are to be found at pages 10 (Discrepancies of Tallies), 34 (Invoice), 35 (Invoice), 36 (Customs Declaration) and 37 (Customs Declaration). Nothing was recorded regarding the bills of lading. They must, therefore, be taken as agreed documents whose contents were not in dispute. In this appeal bill of lading at page 74 of Appeal Record, therefore, becomes important.

It is rather unfortunate that the attention of the learned judge was not drawn to this particular bill of lading. If this had been done, perhaps he would come to a different conclusion and would certainly not have concluded his judgment in these words: —

"With regret, since I am only too aware of the absurdity, I came to the conclusion on the evidence before me, that there is no proof that the two cases delivered into the bailment of the defendants contained the pharmaceuticals alleged. The claim is dismissed with costs."

The absurdity lies on the fact that there could be no theft of empty cases. There was nothing to be stolen since the contents were not in the cases.

Appellants explained that the first issue should not have been submitted to the learned judge for decision. Paragraphs 3 and 4 of the Statement of Claim read: —

"3. The plaintiff's claim against the defendant is for the sum of $5,155.65 being the value of 2 cases of pharmaceuticals.

4. The plaintiffs were consignees of goods, namely 2 cases pharmaceuticals shipped and loaded ex S.S. 'Cardiganshire' at London for discharge at Penang."

The particulars of claim are set out simply as "2 cases Pharmaceuticals — $5,155.65."

By paragraph 3 of the Amended Defence it is pleaded that: —

"3. As regards paragraphs 3 and 4 of the Statement of Claim the defendants state that proof thereof lies with the plaintiffs."

The contention of appellants is that parties agreed to certain facts by which it would seem that respondent had conceded to the very facts pleaded and disputed by them in paragraph 3 of their defence above. Therefore, there was no necessity for appellants to prove what were already agreed and conceded.

On the other hand, respondent did not agree with the explanations given by appellants. They maintained that paragraph (i) of the agreed facts simply meant that appellants had ordered the goods. That was made even clearer by the first issue submitted to the learned judge for decision. This contention found further support in paragraph (iii) of the agreed facts, that is to say, if the two cases were proved to contain the alleged pharmaceuticals then the value would be agreed at $5,155.65. I am inclined to accept the contention of respondent as the correct one. I think it is too late for appellants to adjust their position on ground of mistake, if any.

Counsel for respondent stated that he objected to the "Agreed Bundles" because they included documents, the admission and contents of which were disputed. The "Agreed Bundles" were prepared by appellants. He was informed by counsel for appellants of the practice in Kuala Lumpur. In any case he told appellants of his objection and that he would raise his objection in court. Objection was apparently taken in court. He said the bills of lading were not supposed to be in the Agreed Bundles. From the record nothing was said about them at trial.

Sarkar on Evidence, 12th Edition, Volume 1 page 581 states that: —

"Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted, and cannot be challenged by cross-examination or otherwise. In case of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents which can be challenged by cross-examination or otherwise (*Lionel Edwards Ltd.* v. *S.A.* 1967 C 191).

Where documents were produced and not disputed, the Privy Council held that they should be received without proof (*Takai* v. *Beglar* 6 MIA 521; *Nanda Kishore* v. *Ram Kalpa* 6 BLR Ap. 49)."

In *Henry Trading Co. Ltd.* v. *Harun*[7] Wan Suleiman J. as he then was, commenting on certain documents remarked that: —

"The other statement of law made by the learned trial judge on which I feel I should comment is that part of the judgment wherein he said that the contents of an agreed bundle of documents must be proved unless such contents are admitted by the other side. With respect, I say that where there is an agreed bundle of documents there is no need to prove these documents. This rule is too well established in law to be doubted.'

Now *Odgers* on Pleading and Practice, 12th Edition, page 298 has this to say: —

"If the correspondence is voluminous it will be necessary to have an agreed bundle for the use of the judge, the paging of which should be identical with that of the bundles for counsel on both sides. In default of special agreement, only such letters in the bundle as are actually read at the trial will be taken to be in evidence, and agreeing a bundle does not constitute an admission that all letters contained in it are admissible in evidence."

On questions of fact, no one case is an authority for another. Each case must be decided on its particular facts.

In the present case respondent were aware of the documents in the agreed bundles. Unless objection was taken appellants should be allowed to use the documents provided they were relevant and admissible. As regards the bills of lading it is too late in the day for respondent to raise objection here as to their admissibility or contents.

It would seem that when the contents of the customs declarations, invoices, tally sheets were re-

corded as not admitted the learned judge considered that the appellants were required to prove their contents. In other words, those documents were regarded as disputed documents. For convenience, those documents were allowed to be included in the Agreed Bundles when, strictly speaking, they should not. There is a distinction between evidentiary admissions and admissions by pleadings. The appellants should have called the maker or makers of the customs declarations to give evidence. As regards the invoices the provision of section 32(b) of the Evidence Act, 1950 was brought to the attention of the learned judge. Considering the small amount of claim it would seem unreasonable to incur expenses very much over the amount of claim by calling the person or persons from England just to give formal evidence relating to the preparation of the documents. This would increase the cost of the proceedings and result in inconvenience and perhaps, delay.

The bills of lading were put in with the knowledge of respondent. While they disputed the contents of the invoices, customs declarations and tally sheets, they did not challenge the admissibility and contents of the bills of lading. Perhaps, the reason for not objecting is shown by the fact that they conceded that the bill of lading was sometimes endorsed and treated as a delivery order by respondent. It was contended that the bills of lading though admitted were legally inadmissible. No authority was cited to support such a sweeping proposition. Perhaps, the true significance of the bills of lading was not realised then.

A bill of lading is unlike an invoice or customs declaration. Of course if the contents of the invoices and customs declarations were established the appellants' case would be very much stronger. *Stroud's* Judicial Dictionary, 4th Edition, Volume 1, page 290 has this to say about a bill of lading: —

"A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for certain FREIGHT. The contract, in legal language, is a contract of BAILMENT (2 Raym. Ld. 912). In the usual form of the contract, the undertaking is to deliver to the order, or assigns, of the shipper. By the delivery on board, the ship-master acquires a *special* property to support that possession which he holds in right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act, sufficient in law, to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods" (*per* Loughborough C.J., *Lickbarrow* v. *Mason, In H.L., Mason* v. *Lickbarrow* 1 Bl.H. 359).

Viscount Finlay, speaking on the bill of lading, in *Hain Steamship Company Ltd.* v. *Herdman & McDougal*[8] stated: —

"But then there is this cardinal principle to be borne in mind. A bill of lading is a document of very great commercial importance, and it would be calamitous if a bill of lading were lightly to be got rid of. A bill of lading contains an admission the captain is authorised to sign for goods which are put on board. If, inadvertently, a signature has been given for goods not put on board, the admission contained in the bill of lading may be got rid of by establishing that the goods were not put on board; but still the fact that the bill of lading was given by the representative of the shipowner throws upon him the burden of establishing that fact."

Nevertheless, a bill of lading is *prima facie* evidence of the goods shipped. There arose a rebuttable presumption that the goods discharged contained the pharmaceuticals. I do not think respondent had rebutted such presumption. *Carver*, Carriage by Sea, 12th Edition, Volume 1, page 64 paragraph 75 under the heading of *Bill of Landing, prima facie evidence of quantity shipped* states:

"But, although the amount of cargo stated in the bill of lading to have been shipped is not conclusive evidence, as against the shipowner, of the amount actually shipped, it is strong *prima facie* evidence of that amount, unless the contrary is proved by apt words in the bill of lading. A shipowner is bound to deliver the full amount of goods signed for by the master in the bill of lading, unless he can prove that the whole or some part of it was in fact not shipped by very satisfactory evidence."

The admission of the bill of lading, therefore, throws the burden on respondent to displace or contradict the admission. There could be various ways whereby goods in the two cases might have disappeared. The bill of lading raised the presumption that the goods were actually shipped. There is no evidence that they had been tampered with on board. The learned judge had found as a fact that the two cases were discharged at the port and kept by respondent. It cannot be said that the presumption has been discharged by respondent. At page 35 of the Appeal Record the learned judge stated clearly that on the third issue he would adopt the reasoning of Abdul Hamid J. in *The Borneo Co. (M) Sdn. Bhd.* v. *Port Swettenham Authority*[9] and *T. W. Wu & Co. (M) Sdn. Bhd.* v. *The Sanko Asia Ltd. & Anor.*[10] These two cases cited have been upheld by this court recently.* He, therefore, "came to the conclusion, on the evidence, especially in this case the clearer evidence of possible collusion between the thieves who had stolen the goods and at least some of the security guards that the defence could not be said to have exercised due care." There is little doubt that if the bill of lading has been drawn to his attention he would have decided the first issue in favour of appellants. Since the contents of the two cases have been established by the bill of lading, the implication arising from the findings of the learned judge on the third issue as well as the second issue could only mean that the disappearance of the contents of the two cases had occurred while the two cases were at the godown and in the custody of the respondent. The absurdity is accordingly removed.

For reasons given, I would allow the appeal with costs. The deposit is to be returned to appellants.

Suffian L.P. and **Wan Suleiman F.J.** concurred.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Lim Huck Aik & Co.*

* See [1975] 2 M.L.J. 80 and 73 respectively.